

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

BRANDON D.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2010100582

DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 11, 2011, in Culver City.

Claimant was represented by his mother Angela D. (Mother).¹ Lisa Basiri, Fair Hearing Coordinator, represented the Westside Regional Center (WRC or Service Agency).

The documentary and testimonial evidence described below was received, and argument was heard. The record was closed and the matter was submitted for decision on May 11, 2011.

ISSUE

Whether the Service Agency may terminate claimant's respite services, which are used for his weekend personal attendant, for 12 hours per each weekend day, for a total of 96 hours per month.

¹ Claimant and his mother are identified by first name and last initial, or by title, to protect their privacy.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-9.

Testimonial: Lisa Basiri and claimant's mother.

FACTUAL FINDINGS

Claimant's Background

1. Claimant is an 18-year-old male whose date of birth is August 28, 1992. He is a consumer of the Service Agency based on his diagnoses of autism and mild mental retardation. Claimant lives at home with his parents and older brother Aaron, who is also a consumer of the Service Agency. Both parents work outside the home. Claimant's father is an attorney and Mother is a real estate agent.

2. Claimant attends Kayne Eras Center, which is a non-public school for students with difficulties functioning in the public school system. Claimant has a one-to-one aide at school due to his intensive behavioral issues and social-emotional needs. He is scheduled to graduate on June 22, 2011, with a certificate of completion other than a diploma. The family's post-secondary goal for claimant is to have him attend TAFT or UCLA-Pathways.

3. Claimant displays many stereotypic characteristics of autism, including erratic eye contact, impaired communication, impaired social interaction, and repetitive body movements. He responds well to structure and firmness and thrives on routines. Claimant performs most of his self-help skills, such as dressing, brushing his teeth, washing his hands and bathing, but needs parental instruction to complete the tasks. Claimant can say two-word sentences, and can speak and write in complete sentences and use spontaneous language when he is highly motivated. However, he often relies on physical contact (i.e., grabbing, pulling, touching, and gesturing) to get his needs met. With verbal reminders, he will use words to communicate.

4. Mother has a difficult time managing claimant. He lacks safety awareness and fear of danger. He wanders away and frequently endangers himself unless he is closely supervised. Crisis support services were put in place four years ago when claimant took off on a scooter and was found on the 405 freeway. His parents built higher walls on both sides of the fences of the family home so that claimant cannot hop over and flee. Claimant is generally cooperative. But when he has tantrums, he will scream, cry, and pace when he does not get his way. He causes minor property damage in the family home. He bites all types of objects, including the cords to his videogame machines, and often tries to take apart electronic devices. He urinates in potted plants in the house. Claimant is easily distracted and requires one-to-one instruction or else he does not respond to directions. Past attempts at in-home behavior intervention have been unsuccessful as behaviorists have quit after reportedly feeling endangered around claimant.

Claimant's Respite Services

5. Pursuant to claimant's individual program plan (IPP) dated July 22, 2009, and the Annual Review dated September 20, 2010, the Service Agency currently funds for claimant to receive specialized supervision, five days per week, four hours per day, for a total of 84 hours per month, and respite of 12 hours per each weekend day, for a total of 96 hours per month. The only service at issue in this fair hearing is the weekend respite.

6. The family uses claimant's respite hours to have a personal attendant provide his care and supervision, 12 hours per day, on both weekend days. Claimant spends every weekend away from the family home. For years, he spent every weekend at his aunt's house, with the aunt as the personal attendant. However, due to the aunt's medical condition, claimant has been spending his weekends at the home of Mother's nephew, Steve Johnson, with Johnson as the personal attendant. Mother feels that claimant benefits from the weekends he spends with Johnson, who takes claimant on outings in the community and serves as a good teacher and mentor for claimant.

7. According to the July 22, 2009, IPP, claimant "has been receiving an exceptional number of respite hours due to his AWOL behaviors that have endangered him in the past. He spends every weekend away from the family home because he and his brother, Aaron, are aggressive with one another. . . . This respite is primarily to have [claimant] out of the parents' home on weekends to give parents a break and to separate [claimant] from his older brother."

8. In 2009, a fair hearing request filed on claimant's behalf was resolved by way of an informal meeting pursuant to Welfare and Institutions Code sections 4710.7, 4710.8, and 4710.9. As set forth in the Service Agency's informal decision letter dated October 27, 2009 (Exh. 8), with regard to the weekend respite, the Service Agency agreed it would "continue to fund 12 hours each weekend day however, this is time limited to the next 90 days while you [Mother] complete the application process for In Home Supportive Services (IHSS). [Claimant] will qualify for IHSS as he clearly needs 'protective supervision.'" Mother agreed with the informal decision, as she signed the Notification of Resolution on November 10, 2009.

9. The informal decision letter dated October 27, 2009, referred Mother to the internet website for Disability Rights California (DRC) for information on applying for IHSS protective supervision. According to the DRC website, "[p]rotective supervision is an IHSS service for people who, due to a mental impairment or mental illness, need to be observed 24 hours per day to protect them from injuries, hazards or accidents. An IHSS provider may be paid to observe and monitor a disabled child or adult when the person needs 24-hour supervision and can remain safely at home if it is provided." The DRC website contains, among other things, information on the eligibility requirements for protective supervision, as well as the forms and documentation that must be submitted to the local county welfare office when requesting IHSS protective supervision.

10. According to the DRC website, individuals eligible for IHSS protective supervision must have all of the following:

- 1) A "mental impairment" or "mental illness" that causes functional limitations in memory, orientation (e.g., inability to recognize and adapt to time, people, places, environment, surroundings, etc., needed to live and complete tasks), and judgment (e.g., making decisions which put the individual's health and/or safety at risk); and
- 2) The impairments must cause the individual to experience confusion and an inability to self-direct his or her behaviors so as to keep himself or herself safe and free from harm or injury; and
- 3) The county welfare agency must determine that the individual needs to be observed 24 hours a day in order for him or her to safely remain at home.

11. Although the Service Agency's informal decision letter dated October 27, 2009, stated the weekend respite would be funded only for 90 days, the Service Agency continued funding the service after the 90 day period.

12. During the meeting for the Annual Review of claimant's IPP held on September 20, 2010, Mother reported that claimant was approved for 40 hours per month of IHSS to address his personal care needs. The hours are not for protective supervision. The service coordinator referred Mother to a clients rights advocate to assist her in appealing for IHSS protective supervision services. It was the Service Agency's belief that claimant "could qualify for the maximum number of monthly [IHSS protective supervision] hours due to severe mental impairment, poor judgment, wanders off, and other unsafe behaviors."

13. Subsequently, the Service Agency decided to reauthorize the funding for claimant's weekend respite only through November 30, 2010. The Service Agency notified Mother of its decision in a letter and Notice of Proposed Action, both dated October 5, 2010. The letter stated in part: "Per the outcome of the appeal in October 2009, WRC approved continued funding of the weekend hours for a time-limited period in order to give you sufficient time to complete the In-Home Support Services (IHSS) application process."

14. On October 11, 2010, Mother filed a fair hearing request on claimant's behalf to appeal the Service Agency's decision to terminate funding for the weekend respite effective November 30, 2010. The Service Agency has continued to fund the weekend respite for claimant as aid-paid-pending, pursuant to Welfare and Institutions Code section 4715.

15. Following an informal meeting on November 4, 2010, the Service Agency proposed to reduce claimant's weekend respite from 24 hours per week (i.e., 12 hours per weekend day) to 21 hours per month effective January 1, 2011. This proposal is based on WRC's Service Standards, the applicable law that provides that a regional center shall not purchase more than 21 days of out of home respite in a fiscal year nor more than 90 hours of in-home respite in a quarter, for a consumer, and the Service Agency's determination that claimant did not meet the criteria for an exemption under the applicable law.

Mother's Testimony

16. Mother testified that claimant benefits from spending weekends away from home with his personal attendant, Steve Johnson. The family also benefits from the weekend respite services. Mother is able to conduct client meetings on weekends, which sometimes last a full day, and also take care of other errands. Claimant's weekend time away from home also alleviates problems with his brother Aaron, as the two boys tend to become aggressive towards each other when they are both at home. Mother testified that if claimant's weekend respite is terminated, the family may need to consider a residential placement for claimant. No evidence was presented that the family has requested such a placement for claimant from the Service Agency.

17. Mother's testimony was not clear on the steps she has taken to appeal to the local county welfare office for IHSS protective supervision for claimant. Her testimony was vague and lacked specificity to determine the status of any request to the county for IHSS protective supervision for claimant.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)² A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant properly and timely requested a fair hearing and therefore jurisdiction for this case was established. (Factual Findings 13, 14.)

2. A regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's IPP. (§ 4646, subd. (a)(1).) "Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family." (§ 4648, subd. (a)(2).) A regional center must secure services that are effective in meeting the consumer's IPP goals and are cost-effective, and to the extent possible, reflect the preferences of the consumer and his or her family. (§§ 4512, subd. (b), 4646.)

² All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

3. A regional center is required to identify and pursue all possible sources of funding for consumers receiving regional center services, including but not limited to governmental or other entities or programs required to provide or pay the cost of providing services, such as Medi-Cal, Medicare, school districts, federal supplemental security income, and state supplementary program, and private entities to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer. (§ 4659, subd. (a).)

4. A regional center is required to use generic services and supports when appropriate. "Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." (§ 4648, subd. (a)(8).)

5. In 2009, the Legislature enacted section 4686.5, which governs a regional center's purchase of respite services. Subdivisions (a) and (b) of the statute read, in pertinent part, as follows:

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

(1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.

(2) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter for a consumer.

(3)(A) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family's member's ability to meet the care and supervision needs of the consumer.

[¶] . . . [¶]

(5) A regional center shall only consider in-home supportive services a generic resource when the approved in-home supportive services meets the respite need as identified in the consumer's individual program plan (IPP) or individualized family service plan (IFSP).

(b) For consumer receiving respite services on July 1, 2009, as part of their IPP or IFSP, subdivision (a) shall apply on August 1, 2009.

6. Under section 4686.5, subdivision (a)(1), respite is a service that the Service Agency may purchase for claimant as his care and supervision needs "exceed that of an individual of the same age without developmental disabilities." (Factual Findings 2-4.)

7. Section 4686.5, subdivision (a)(2), provides two different limits on the amount of respite that a regional center may purchase for an eligible consumer, based on whether the respite is in-home or out-of-home. In-home respite is defined in section 4690.2, subdivision (a), as "intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client's own home" that is designed to do all of the following:

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision to ensure the client's safety in the absence of family members.
- (3) Relieve family members from the constantly demanding responsibility of caring for the client.
- (4) Attend to the client's basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family members.

8. Claimant's weekend respite functions similar to in-home respite, except that the service is not "provided in the client's own home," due to the fact claimant spends all his weekends at a relative's house (previously his aunt; currently, Mother's nephew). (Factual Findings 5-7.) Under the circumstances presented, the nature of the respite service, rather than the location where the service is provided, should determine its characterization. Therefore, under section 4686.5, subdivision (a)(2), the Service Agency is limited to purchasing for claimant no more than 90 hours of respite services in a quarter (or the equivalent of 30 hours per month), unless claimant meets the criteria for an exemption under subdivision (a)(3)(A).

9. In this case, it was not established that claimant qualifies for an exemption under section 4686.5, subdivision (a)(3)(A). Although the evidence established that claimant has intense care and supervision needs as a result of his developmental disability, the evidence was insufficient to show that the family would be unable to maintain claimant at home without additional respite over the statutory limit. Mother's testimony that the family

may consider a residential placement is insufficient, absent any evidence that a residential placement has been requested from the Service Agency or pursued by claimant's family. Further, no evidence was presented to establish an extraordinary event impacting the ability of claimant's parents to provide for their son's care and supervision needs at home.

10. Based on the foregoing, claimant's respite services may not be terminated in their entirety; rather, the Service Agency shall be required to continue providing the weekend respite but at the reduced statutory level of 90 hours per quarter (or the equivalent of 30 hours per month).

ORDER

Claimant's appeal is granted in part, and denied in part, as follows: The Service Agency shall authorize funding for claimant to receive respite services of 90 hours per quarter (or the equivalent of 30 hours per month). In all other respects, claimant's appeal is denied.

DATED: May 17, 2011

ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.